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# THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Report of the Secretary-General prepared pursuant to Subcommission resolution 1994/33

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## Introduction

1. In its resolution 1993/29, entitled "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", the Subcommission on Prevention of Discrimination and Protection of Minorities, having examined the study prepared by the Special Rapporteur, Mr. Theo van Boven, contained in his final report (E/CN.4/Sub.2/1993/8), and having noted with particular interest the conclusions and recommendations, as well as the proposed basic principles and guidelines contained therein, decided, inter alia, to examine further the proposed basic principles and guidelines included in the study at its forty-sixth session and for that purpose to establish, if necessary, a sessional working group at that session with a view to adopting a body of such principles and guidelines. The Secretary-General was requested to invite Governments and competent intergovernmental and non-governmental organizations to submit their comments on the proposed basic principles and guidelines included in the study.

2. At its forty-sixth session, the Subcommission, in its resolution 1994/33, having noted with interest the report of the Secretary General prepared pursuant to Subcommission resolution 1993/29 (E/CN.4/Sub.2/1994/7 and Add.1) containing comments on the proposed basic principles and guidelines received from States, intergovernmental organizations and non-governmental organizations, and having noted also the report of its sessional working group on the administration of justice and the question of compensation (E/CN.4/Sub.2/1994/22 and the preliminary consideration given by the sessional working group to the proposed basic principles and guidelines, decided to continue the consideration of the basic principles and guidelines at its forty-seventh session with a view to making substantive progress in the matter. The Secretary-General was requested to invite States and competent intergovernmental and non-governmental organizations which had not yet done so to submit their comments on the proposed basic principles and guidelines. (The text of the proposed basic principles and guidelines is annexed to the present report.)

3. Pursuant to that resolution, the Secretary-General, on 23 January 1995, addressed requests to Governments and competent intergovernmental and non-governmental organizations for comments on the basic principles and guidelines included in the study of the Special Rapporteur.

4. By 1 May 1995, replies had been received from the following States: Belarus and the Netherlands.

5. Replies were also received from the International Labour Organization and the Inter-American Commission on Human Rights, as well as from the Regional Council on Human Rights in Asia.

6. The present report contains a summary of the substantive replies received concerning the proposed principles and guidelines. Any additional replies will be issued as addenda to this document.

7. The Secretary-General deems it appropriate to refer also to Commission on Human Rights resolution 1995/34 of 3 March 1995, in which the Commission, inter alia, encouraged the Subcommission to continue to give consideration to the proposed basic principles and guidelines at its forty-seventh session, with a view to making substantive progress on this matter in the specific field of violations of human rights.

## I. COMMENTS RECEIVED FROM STATES

### A. Belarus

[Original: Russian]
[15 July 1994]

National legislation in the Republic of Belarus which guarantees the right to compensation for victims of gross violations of human rights and fundamental freedoms is being applied to a particular category of persons. Thus, a number of legislative instruments at present govern matters relating to the rehabilitation and restitution of the rights of victims of political repression in the 1920s-1980s. As defined in the decree of the Supreme Council of the Republic of Belarus of 6 June 1991 "on the procedure for the rehabilitation of victims of political repression in the 1920s-1980s in the Republic of Belarus", "persons unjustifiably subjected to repression" means "citizens of the Republic of Belarus, foreign nationals and stateless persons who were prosecuted in the Republic of Belarus by judicial or non-judicial bodies on political, social, ethnic, religious or other grounds for crimes against the State (counter-revolutionary crimes) and who were banished, exiled, sent to special settlements or expelled from the Republic of Belarus by administrative order on those same grounds". The decree states that claims for rehabilitation "may be filed by the next of kin or close relatives of persons subjected to repression, or by other concerned citizens or organizations". A decision regarding a claim for rehabilitation must, furthermore, be made within three months of receipt of the claim by the body empowered to consider it, or within a total of six months if the claim has to be considered by several bodies consecutively.

Arrangements for the restitution of the property, labour, pension, housing and other rights of this category of persons are defined in the statute "on the procedure for the restitution of the rights of citizens who underwent repression in the 1920s-1980s" (dated 21 December 1990). Paragraph 16 of this statute recognizes children who were with their parents in places of confinement, banishment or exile or in special settlements, as well as children who were orphaned owing to the repression of both parents, as having undergone political repression. The statute also stipulates that the procedure and conditions for the restitution of rights and granting of privileges to victims of political repression are applicable to this category of children, but monetary compensation is paid only to children who were with their parents in places of confinement.

The provisions of the above statute have been further developed, inter alia, in the following regulatory instruments: the statue "on the procedure for payment of monetary compensation to victims of political repression in the 1920s-1980s who have been rehabilitated in accordance with

the decisions of the Supreme Council of the Republic of Belarus" (dated 18 December 1992); the decree of the Council of Ministers of the Republic of Belarus "on the granting of privileges to persons unjustifiably subjected to repression in the 1920s-1980s and subsequently rehabilitated" (dated 24 December 1992); and the decree of the Supreme Council of the Republic of Belarus "on the free transfer of ownership of housing (subject to the housing quota or quotas) to victims of political repression and their families".

In addition, there is a commission attached to the Supreme Council of the Republic which provides assistance in securing the rights of victims of political repression in the 1920s-1980s and perpetuating their memory.

## B. Netherlands

[Original: English]
[6 March 1995]

1. First, it should be noted that the Netherlands Government endorses the general tenor of the report. The position of victims of crime is a subject of constant concern to the Government, a concern that is for instance expressed in the amendments to the legislation on this subject. Studies are also in progress to establish the extent to which legislation on compensation for victims of the use of force (whether or not unlawful) requires amending. More generally, the State of the Netherlands acceptance of responsibility for its treatment of Dutch nationals is confirmed by its deference to international human rights instruments, including the individual right of complaint, and the judiciary's recognition of the European Court of Human Rights.

2. Nevertheless, it is clear that some points included in the Special Rapporteur's recommendations have not yet been incorporated into Dutch legislation. This applies in particular to point 7 under the "General principles", which focuses on the scope for adequate compensation for groups of victims, who must be allowed to submit collective claims and receive collective compensation. Nor does there exist any precedent within the Dutch legal order for the proposed positive action for such groups in relation to their development.

3. Another point is the topic of "universal jurisdiction for human rights violations that constitute crimes under international law", as quoted by the Special Rapporteur in point 12 under the "Procedures and mechanisms". The consequences of such jurisdiction are not entirely clear. It can hardly be imagined how a Dutch court could be expected to try alleged violations against an asylum seeker by a foreign State within its own territory. Clarification by the Special Rapporteur of this part of the proposals would seem to be called for.

4. A related consideration is the recommendation contained in point 19 under "Procedures and mechanisms": should every State's duty to protect victims and their relatives not be limited to those persons within its own territory?

## II. COMMENTS SUBMITTED BY SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

### A. International Labour Organization

[Original: English]
[23 March 1995]

ILO welcomes this move towards strengthening respect for basic human rights, and notes that the Special Rapporteur's report makes extensive reference to decisions of ILO supervisory bodies in this respect.

While we have no specific additions to make to the proposals, we would point out that, in ILO terms, freedom of association and trade union rights have been consistently included among workers' human rights. They are not mentioned in paragraph 1 ("General principles") of the proposed basic principles.

### B. Inter-American Commission on Human Rights

[Original: English]
[14 February 1995]

The Inter-American Commission on Human Rights is convinced that the subject of the study by Mr. Theo van Boven concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms is a growth area in the field of the international law of human rights and that this study will prove very useful.

Enclosed is a copy of an article by David J. Padilla, Assistant Executive Secretary of the Inter-American Commission on Human Rights, entitled "Reparations in Aloeboetoe v. Suriname".1/ Also enclosed is the text of the Judgement of 10 September 1993 of the Inter-American Court of Human Rights in the matter of the Aloeboetoe et al. case.1/

## III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

### A. Regional Council on Human Rights in Asia

[Original: English]
[9 March 1995]

The Regional Council on Human Rights in Asia welcomes the adoption of basic principles and guidelines governing the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The Council applauds the initiatives of the Subcommission on Prevention of Discrimination and Protection of Minorities to seek effective mechanisms to redress and prevent gross violations of human rights.

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1/ Available for consultation in the files of the secretariat.

While the Council welcomes the proposed basic principles and guidelines, and supports the initiatives of the Subcommission in this field, the Council, however, respectfully submits its comments and recommendations relating to general principles, forms of reparation, and procedures and mechanisms.

General principles

The proposed basic principles and guidelines are silent on the period within which an action for reparation must be resolved. The Council believes that the right to speedy trial should be enshrined as one general principle.

In the Philippines, for example, an action for damages arising from torture and other gross violations of human rights committed in 1982 was filed by 20 political prisoners before a Philippine court on 20 February 1983 (Rogelio Aberca, et. al., versus major General Fabian Ver, et. al., Civil Case No. 37487, Regional Trial Court Branch 107, Quezon City, National Judicial Capital Region, Philippines). The lower court ruled in favour of the political prisoners only on 19 February 1993, 10 years later. The court found the soldiers and military officers jointly and solidarily liable for acts of torture and other violations of human rights and awarded actual, moral and exemplary damages and attorneys' fees to the political prisoners. However, the soldiers and military officers involved have since appealed the decision before the Court of Appeals (CA-GR CV No. 43763) where the case has been submitted for decision. The Council believes that the delay of 12 years is not only unreasonable but is in itself violative of the right to reparation for gross violations of human rights. Hence the Council strongly urges the Subcommission to include the right to speedy trial as one of the general principles governing the right to reparation.

Gross human rights violations occur, often with alarming frequency, throughout South-East Asia. Many of these violations are a result of direct state policy and intervention. The general principles, however, do not mention the liability of those officers and officials responsible for state policy, and/or who may have issued direct or indirect commands to soldiers and policemen. These persons are, in the Council's opinion, as responsible and as liable for gross violations of fundamental rights and freedoms, as those who actually commit the acts. Hence, the Council believes they too should be subject to actions for reparation, and urges the Sub-Commission to incorporate this concept in the general principles governing the right to reparation.

Forms of Reparation

The Council supports the different forms of reparation outlined in the proposed basic principles and guidelines. The Council, however, recommends that exemplary or punitive damages - damages imposed, by way of example, for the public good, in order to avoid a repetition of wrongful acts - be included as one of the forms of compensation.

Procedures and mechanisms

The Council also recommends that the proposed procedures and mechanisms be amended, as follows:

(a) The proposed procedures and mechanisms should contain a categorical statement barring military tribunals or courts from having any jurisdiction over actions for enforcement of the right to reparation. The Council believes that the proposed procedures and mechanisms should provide for sole jurisdiction by competent and independent civilian courts.

(b) The proposed procedures and mechanisms call for a readily accessible legal system. Throughout South-East Asia, most victims of gross human rights violations are poor and underprivileged; they do not possess the financial resources necessary to bring - and sustain - a suit for reparation. Thus, the Council urges the Subcommission to adopt the procedure of waiving filing and other court fees in order to ensure accessibility of the right to reparation.

(c) The proposed procedures and mechanisms call for states to protect victims, relatives and witnesses from intimidation and reprisal. In practice, however, many witness protection programmes in the region allow the same officers or military units against whom charges are brought for violating human rights to protect the very victims who have brought charges against them. Hence, the Council urges the Subcommission to consider imposing clear-cut standards on witness protection programmes to make them compatible with the spirit and the letter of the proposed procedures and mechanisms.

Final comments

Finally, the Council seeks clarification on what mechanism, if any, is available if States parties to the basic principles and guidelines fail to comply with any or all of the provisions contained therein. The Council has experienced, to its regret, a widening gap in the region between state commitments to uphold human rights and state practice and policy. Hence the Council is concerned that the basic principles and guidelines may remain in the realm of ideals and rhetoric.

Annex

PROPOSED BASIC PRINCIPLES AND GUIDELINES

General Principles

1. Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

2. Every State* has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions.

3. Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.

4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

5. Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators. Impunity is in conflict with this principle.

6. Reparation may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims.

7. In addition to providing reparation to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation. Special measures should be taken for the purpose of affording opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.

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* Where these principles refer to States, they also apply, as appropriate to other entities exercising effective power.

Forms of reparations

8. Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property.

9. Compensation shall be provided for any economically assessable damage resulting from human rights violations, such as:

(a) Physical or mental harm;

(b) Pain, suffering and emotional distress;

(c) Lost opportunities, including education;

(d) Loss of earnings and earning capacity;

(e) Reasonable medical and other expenses of rehabilitation;

(f) Harm to property or business, including lost profits;

(g) Harm to reputation or dignity;

(h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

10. Rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.

11. Satisfaction and guarantees of non-repetition shall be provided, including:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) A declaratory judgement in favour of the victim;

(d) Apology, including public acknowledgment of the facts and acceptance of responsibility;

(e) Bringing to justice the persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion of an accurate record of human rights violations in educational curricula and materials;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals;

iii) Strengthening the independence of the judiciary;

(iv) Protecting the legal profession and human rights workers;

(v) Providing human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

Procedures and mechanisms

12. Every State shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law.

13. The legal system, especially in civil, administrative and procedural matters, must be adapted so as to ensure that the right to reparation is readily accessible, not unreasonably impaired and takes into account the potential vulnerability of the victims.

14. Every State shall make known, through the media and other appropriate mechanisms, the available procedures for reparations.

15. Statutes of limitations shall not apply in respect to periods during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations.

16. No one may be coerced to waive claims for reparations.

17. Every State shall make readily available all evidence in its possession concerning human rights violations.

18. Administrative or judicial tribunals responsible for affording reparations should take into account that records or other tangible evidence may be limited or unavailable. In the absence of other evidence, reparations should be based on the testimony of victims, family members, medical and mental health professionals.

19. Every State shall protect victims, their relatives and friends, and witnesses from intimidation and reprisals.

20. Decisions relating to reparations for victims of violations of human rights shall be implemented in a diligent and prompt manner. In this respect follow-up, appeal or review procedures should be devised.

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